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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LOS ANGELES LAND COMPANY,
Petitioner,
v.
BRUNSWICK CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER [1]

Rather than defending the reasoning of the court below, respondent Brunswick Corporation seeks to avoid confronting the questions presented. It takes two tacks in this effort: First, it reargues the evidence at length, overlooking the fact that a properly instructed jury has already weighed the evidence and found against it. Second, Brunswick seeks to recast the Ninth Circuit's ruling as simply a review of the sufficiency of the factual evidence to support the jury's finding, when the court below plainly overturned the jury verdict in reliance on legal rulings—rulings that form the basis of the questions presented in our petition. Neither effort should divert this Court from granting review to consider those important and recurring legal questions.

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[1] Petitioner's Rule 29.1 statement appears at Pet. ii.

1. Contrary to Brunswick's statement, Opp. at 5, the jury did not simply return a general verdict. The jury—pursuant to instructions to which Brunswick did not and does not object—returned a special verdict (set forth at Pet. App. 26a-32a) specifically finding that Brunswick possessed "monopoly power in the relevant market" and "willfully maintain[ed] that power through restrictive or exclusionary conduct, as opposed to legitimate competitive behavior." *Id.* at 27a. En route to its erroneous legal rulings, the Ninth Circuit expressly assumed that "the record fully supports findings that, as L.A. Land sought to prove at trial, Brunswick prepared a false or misleading market survey, delayed transmittal to DCC of L.A. Land's financing application, and prevailed upon Timberlake not to contract with L.A. Land"—findings that "support the conclusion that Brunswick committed anticompetitive acts." *Id.* at 10a.

Yet Brunswick devotes the bulk of its maximum-length opposition to retrying the case. It attempts to prove what the jury expressly disbelieved—that "Brunswick committed no anticompetitive acts." Opp. at 24. That factual dispute has already been decided, and Brunswick cannot make the purely legal questions presented in the petition appear fact-bound simply by trotting out in lengthy footnotes evidence not credited by the jury.[2]

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[2] Needless to say, our view of the evidence differs dramatically from that presented in Brunswick's opposition. To cite just one example, Brunswick repeatedly asserts that petitioner's owner "had a personal net worth of $11 million," apparently suggesting that the fact that "bowling equipment financing is hard to obtain" (Pet. App. 11a) may be overlooked in such circumstances. Opp. at 3, 20. The issue, however, is the characteristics of the market and whether entry barriers exist in that market, not the characteristics of a corporation's stockholder. Petitioner's owner was sufficiently illiquid so that raising the necessary funds required equipment financing; Brunswick's own executives testified that virtually all bowling centers are established on a leveraged basis, normally at the level petitioner intended to leverage its project. *See* Ex. 54A, 347 B-1, R.T. 719-724, 1662-63, 1941, 2531-32. In any event, the

2. a. Contrary to Brunswick's effort to rewrite the opinion below, the Ninth Circuit did not simply review the evidence and conclude that it was insufficient to support a finding of monopoly power. The court below instead accepted as given that (1) Brunswick controlled 100% of the relevant market, (2) Brunswick committed anticompetitive acts to keep L.A. Land out of that market, and (3) the jury could find that bowling equipment financing was difficult to obtain. The court below did not question the factual sufficiency of the evidence to support these propositions.

The lower court nonetheless overturned the jury verdict in favor of L.A. Land and the jury's express finding that Brunswick possessed monopoly power (Pet. App. 27a) because of two erroneous legal rulings. First, the Ninth Circuit ruled that there could be no monopoly power because there were no barriers to entry. The court acknowledged that "the jury was entitled to find that bowling equipment financing is hard to obtain," *id.* at 11a—not, as Brunswick would have it, that financing was hard only for L.A. Land to obtain. Opp. at 21. The Ninth Circuit then held that this barrier to entry could not be considered as such under Section 2 of the Sherman Act because, as a matter of law, only *differential* barriers to entry—greater burdens for new entrants than for incumbents—pose the necessary danger that defendant's monopoly will be preserved.

Given Brunswick's effort to obfuscate this plain legal ruling, we are compelled to quote the Ninth Circuit's own words at some length:

> [T]he jury was entitled to find that bowling equipment financing is hard to obtain. However, the jury could not rationally construe this factor as a barrier

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important point is that such factual disputes are in no way pertinent to the purely legal grounds for the decision below and the questions presented in the petition.

> to entry, *as there was no evidence that the lenders who were willing to finance bowling equipment imposed higher financing costs on new entrants than on established firms.* * * * The fact that many lenders do not understand the bowling market does not mean that the capital costs for new entrants and incumbents in the market differ, or that it is any more difficult for new entrants to obtain financing than incumbents. * * * The disadvantage of new entrants *as compared to incumbents* is the hallmark of an entry barrier. [Pet. App. 11a-12a (emphasis added).]

This requirement of differential entry barriers is incorrect as a matter of antitrust law. The Ninth Circuit's embrace of that proposition puts it squarely in conflict with other circuits that have a much broader concept of entry barriers,[3] and resolution of that conflict and clarification of what constitutes an entry barrier is an important and recurring question demanding the attention of this Court.[4]

b. Brunswick agrees with us that it would be "erroneous" to hold that "a defendant cannot possess monopoly power in a downstream market unless it also possesses monopoly power in an upstream market." Opp. at 25. Although that is precisely what the Ninth Circuit held in this case, *see* Pet. App. 13a-14a, Brunswick argues that

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[3] *See, e.g., Reazin* v. *Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 968 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990); *Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, 740 F.2d 980, 1001 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).

[4] The Ninth Circuit's error was compounded by its view, announced without any supporting authority, that "anticompetitive conduct by one firm against another is not an 'entry barrier'." Pet. App. 11a. *See* Pet. at 16 n.9. This erroneous view allowed the Ninth Circuit wholly to disregard the jury's express finding that Brunswick engaged in "restrictive or exclusionary conduct, as opposed to legitimate competitive behavior," which "injured" L.A. Land, Pet. App. 27a, and amply refutes Brunswick's assertion that the lower court "covered the waterfront of possible definitions" of entry barriers. Opp. at 11-12.

what it concedes to be an "erroneous" rule as a general matter is somehow acceptable in this case. The reason, according to Brunswick, is that L.A. Land supposedly claimed that Brunswick had an obligation to assist it in entering the market, and therefore L.A. Land "should indeed be required to show that there was nowhere else to turn." Opp. at 26.

That is of course not our claim, and never has been. Brunswick had no obligation to sell equipment to L.A. Land, or arrange financing for the sale. But once it undertook to do these things, it *did* have an obligation not to engage in anticompetitive acts in connection with them that were designed to keep L.A. Land out of the market. The jury, of course, expressly found that Brunswick did just that. Pet. App. 27a.

Thus, Brunswick's assertion that if it "did not want petitioner to get a loan, it did not have to 'delay' petitioner's paperwork; all it had to do was refuse to guarantee the loan," Opp. at 27, conveniently misses the point. What we argued to the jury, and what the jury accepted, was that Brunswick wanted L.A. Land to *believe* that it was willing to sell L.A. Land equipment and help finance the sale. L.A. Land would then rely on Brunswick, while Brunswick deliberately held up L.A. Land's application and circulated the deceptive market survey, which effectively dried up any remaining financing sources. *See* Pet. at 4-5.[5] In the meantime, Brunswick itself opened a second bowling center and thereby solidified its 100% monopoly. Simply "refus[ing] to guarantee the loan" would not have achieved Brunswick's anticompetitive objectives.

3. In our petition, we explained the critical role that the concept of entry barriers plays in antitrust analysis. *See* Pet. at 9-13. We noted that despite this critical role—

[5] Brunswick simply ignores the impact of the market survey in claiming ease of entry. *See* Opp. at 15-18.

which respondent in no way disputes—this Court has never spoken on the appropriate definition of entry barriers. Brunswick expressly acknowledges that this is so, Opp. at 10 n.14, and further concedes that the lower courts have thus far failed to settle on a uniform definition of what constitutes an entry barrier. *See* Opp. at 12 n.15 ("Unfortunately, the courts are further ahead in recognizing that entry analysis is important than they are in understanding or articulating the dimensions of that analysis") (quoting Janusz A. Ordover & Daniel M. Wall, *Proving Entry Barriers: A Practical Guide to the Economics of New Entry, Antitrust*, Winter 1988, at 12).

In the face of this acknowledged confusion, Brunswick retreats to the last refuge of a respondent on certiorari—an assertion that "the issue has not yet 'percolated' in the lower courts." Opp. at 12 n.16. In fact, the question of the appropriate definition of entry barriers has been "percolating" in the lower federal courts for several decades.[6] The result has been increasing uncertainty, not emerging consensus and clarity. Given the critical importance of entry barrier analysis to antitrust law, this Court should grant review to help resolve the conceded confusion in the lower courts.

This uncertainty in the lower courts is also reflected in the positions of the various governmental enforcement entities. Brunswick argues that the Federal Trade Commission adheres to the Ninth Circuit view that only differential entry barriers can confer monopoly power, Opp. at 11, and quotes the Economic Report of the President for the proposition that market power is of limited con-

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[6] *See, e.g., American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F.2d 524, 530-531 (2d Cir. 1958); *A.G. Spalding & Bros., Inc.* v. *Federal Trade Commission*, 301 F.2d 585, 618-620 (3d Cir. 1962); *United States Steel Corp.* v. *Federal Trade Commission*, 426 F.2d 592, 604-605 (6th Cir. 1970); *United States* v. *Waste Management, Inc.*, 743 F.2d 976, 981-982 (2d Cir. 1984); *Reazin*, 899 F.2d at 971-972.

cern "in markets in which new competition *can* quickly and easily appear." Opp. at 16 (quoting Economic Report of the President 174 (Feb. 1994) (emphasis added by Brunswick)). On the other hand, as we pointed out in the petition, the new Department of Justice Antitrust Division and Federal Trade Commission merger guidelines addressed entry barriers in detail because of concerns that entry arguments were being uncritically accepted. The new guidelines ask not whether entry *could* occur, but rather whether entry *would* occur. The Ninth Circuit's imposition of the highly theoretical "differential" definition of entry barriers is plainly at odds with this Federal Government enforcement policy. *See* Pet. at 12-13.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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